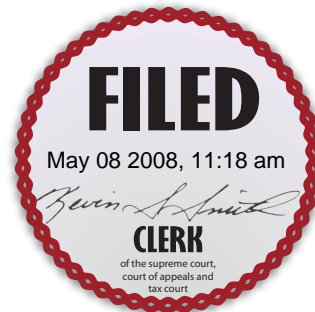


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HENRY LUKE KELLEMS, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 62A05-0709-CR-513

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Jonathan J. Parkhurst, Judge
Cause No. 62C01-0203-FD-236

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Henry Luke Kellems, Jr. was convicted of Operating a Motor Vehicle while Privileges Suspended,¹ a class D felony. Kellems presents two issues for review:

1. Did the State present sufficient evidence to support Kellems's conviction?
2. Did the trial court err in admitting into evidence a certified copy of Kellems's driving record?

We affirm.

The facts as set out by our Supreme Court in Kellems's prior appeal follow.²

On March 20, 2002, the Tell City Police Department received a telephone call from a woman identifying herself as Dodie McDonald. McDonald reported seeing a man she identified as Luke Kellems driving from Troy to Tell City. According to her report, Kellems was driving without a license or insurance, intoxicated, and with children in the vehicle. Additionally, McDonald provided the police with a description of Kellems's vehicle, a white pickup truck, and his license plate number.

Tell City Police Sergeant Lynn Wooldridge responded to the dispatch of McDonald's tip. After spotting Kellems in a white pickup truck, he followed it to confirm whether the license plate number matched that given to dispatch by McDonald. Having matched the plates, Sergeant Wooldridge pulled Kellems's vehicle over without observing any traffic violation.

Upon pulling Kellems over, Sergeant McDonald approached the truck with Kellems sitting in the driver's seat and his wife and child in the passenger seats. Sergeant Wooldridge requested Kellems's driver's license and received an identification card instead. The identification card was checked through the Bureau of Motor Vehicles and indicated that Kellems had a suspended driver's license and was a habitual traffic offender. A portable breathalyzer test was administered to Kellems, which came up negative. Kellems was then arrested and charged with operating a vehicle while a habitual traffic offender.

¹ Ind. Code Ann. § 9-30-10-16(a)(1) (West, PREMISE through 2007 1st Regular Sess.).

² The facts presented to the jury during Kellems's retrial are consistent with the facts as set out by our Supreme Court in the prior appeal.

Kellems v. State, 842 N.E.2d 352, 353-54 (Ind. 2006), *rev'd on reh'g*, 849 N.E.2d 1110.

On March 27, 2002, the State charged Kellems with operating a vehicle after being adjudged an habitual traffic violator (HTV). A bench trial was held on October 23, 2003, and Kellems was found guilty as charged and sentenced. Upon direct appeal, Kellems's conviction was ultimately reversed by our Supreme Court. *Kellems v. State*, 849 N.E.2d 1110 (Ind. 2006) (*opinion on reh'g*). On June 25, 2007, Kellems was retried by a jury and again convicted as charged. On July 23, 2007, the trial court sentenced Kellems to three years, which was time he had already served. Kellems filed a Notice of Appeal on August 17, 2007.

1.

Kellems argues that the evidence at trial was insufficient to support his conviction. Specifically, Kellems contends that there was insufficient evidence to establish that he, as the individual charged with the offense, was the same individual adjudged an HTV.

Upon review of a claim of insufficient evidence, we will neither reweigh evidence nor judge the credibility of witnesses. *Williams v. State*, 798 N.E.2d 457 (Ind. Ct. App. 2003). Rather, we consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Kellems was charged with violating I.C. § 9-30-10-16(a)(1), which provides that “[a] person who operates a motor vehicle . . . while the person’s driving privileges are validly suspended under this chapter [habitual violator of traffic laws] . . . and the person

knows that the person's driving privileges are suspended . . . commits a Class D felony.” Kellems does not dispute that he was driving the vehicle on the day in question or that the “HENRY L KELLEMS JR” identified in State's Exhibit 1, a certified driving record, had his driving privileges validly suspended for being an HTV. Kellems argues that there was insufficient evidence to prove that he was the same individual identified in the certified driving record.

During trial, Sergeant Wooldridge testified that he knew Kellems³ and was familiar with his driving record and status as an HTV. Sergeant Wooldridge also testified that during the stop he received an Indiana identification card from Kellems and checked the information through the Bureau of Motor Vehicles by relaying information on the identification card to a dispatcher,⁴ who then informed Sergeant Wooldridge of Kellems's status as an HTV. A dispatch report created at the time of the initial call from McDonald and updated throughout the course of the stop as information was provided by McDonald and/or Sergeant Wooldridge includes Kellems's date of birth, social security number, and identification number. *See State's Exhibit 2.* This same identifying information is provided on the certified driving record for “HENRY L KELLEMS JR” submitted by the State as State's Exhibit 1.

³ Sergeant Wooldridge testified that he knew Kellems as “Luke Kellems”. *Transcript* at 124.

⁴ Although Sergeant Wooldridge did not specify precisely what information he provided to the dispatcher, the jury could have reasonably inferred from the context of his testimony that he relayed to dispatch identification information found on the identification card provided by Kellems. Sergeant Wooldridge explained in general terms that identification cards include a person's name, date of birth, height, weight, identification number, and sometimes social security number.

Considering the evidence as a whole, the jury could have reasonably inferred that Kellems was the same individual identified in the certified driving record as an HTV. We therefore conclude that the evidence was sufficient to support Kellems's conviction.

2.

Kellems argues that the trial court erred in admitting improper character evidence in contravention of Indiana Rule of Evidence 404(b). Specifically, Kellems challenges the admission into evidence, over his objection, of State's Exhibit 1, an unredacted, certified driving record for "HENRY L KELLEMS JR", which informed the jury of criminal acts and driving misconduct attributed to Kellems for which he was not on trial. *State's Exhibit 1*.

To prove that Kellems's driving privileges were validly suspended, the State offered into evidence a certified driving record for "HENRY L KELLEMS JR". Kellems objected to the admission of State's Exhibit 1 "to prove that he was driving while he's suspended because it's not valid to charge a felony offense. There's some prejudicial stuff in there." *Transcript* at 127. Kellems continued, arguing that the record was hard to read, that there were other ways to prove that he had a suspended license, and that he had other reasons for objecting that he could not explain. After the jury was excused, Kellems was afforded a full opportunity to explain his objection. Kellems added to his earlier objection that only a judge, not the BMV, could suspend someone's license. The trial court admitted State's Exhibit 1 over Kellems's objection. The trial court suggested, and Kellems and the State agreed, that portions of the Exhibit referring to "old tickets" should be removed. *Transcript* at 134.

Our standard of review for the admissibility of evidence is well established. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.*

Errors in the admission of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. *Mathis v. State*, 859 N.E.2d 1275 (Ind. Ct. App. 2007); *see also* Ind. Trial Rule 61. In determining whether an evidentiary ruling has affected a defendant's substantial rights, we assess the probable impact of the evidence on the factfinder. *Id.*

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evid. R. 404(b). An analysis under Rule 404(b) necessarily incorporates the relevancy test of Evid. R. 401 and the balancing test of Evid. R. 403. *Dumes v. State*, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *supplemented on reh'g*, 723 N.E.2d 460 (2000). For evidence of other crimes, wrongs, or acts to be admissible, a court must determine that: (1) the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect. *Id.* Pursuant to Evid. R. 404(b), evidence of

other crimes, wrongs, or acts may be admissible for “other purposes”, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. As our Supreme Court has observed, “[e]vidence of a prior conviction is as prejudicial as evidence can get, and [thus,] requires a strong showing of probative value”. *Thompson v. State*, 690 N.E.2d 224, 235 (Ind. 1997).

In *Dumes*, the State was required to prove beyond a reasonable doubt that Dumes’s driving privileges had been forfeited for life on a certain date and that he operated a vehicle on that date. To prove the lifetime suspension, the State offered into evidence a copy of Dumes’s driving record. The State’s attempt to redact the record by blacking out portions of the driving record was inadequate, and thus, this court treated the driving record as if it had been admitted in its entirety for purposes of addressing its admissibility. Included in the driving record were driving convictions and suspensions unrelated to the charge for which Dumes was being tried.

Applying the above rules, we determined that the State failed to show that the unrelated suspensions and convictions were admissible for “other purposes”, and as such, they were not relevant. We then considered the prejudice element and, taking into consideration the fact that Dumes’s credibility was at issue because Dumes presented evidence that he was not driving on the date of his arrest, concluded that admission of the driving record with the prior, unrelated convictions and suspensions was highly prejudicial and amounted to reversible error. In footnote 5, however, the panel noted its agreement with the dissent in a similar case, *Jones v. State*, 708 N.E.2d 37 (Ind. Ct. App. 1999), *trans. denied*, that if the only issue before the jury had been whether the

defendant's license had been suspended for life, and thus no credibility determination had to be made, it would have determined the error in the admission of the driving record was harmless. *Dumes v. State*, 718 N.E.2d 1171. In such case, where the only issue is a legal one, the panel reasoned that there would be no danger the jury would convict the defendant based on his character rather than the acts he committed that were related to the charge for which he was being tried. *Id.*

Here, the State presented an unredacted copy of Kellems's driving record that identified twenty-six driver's license suspensions and the "suspension reasons"⁵ and listed sixteen "convictions",⁶ the vast majority of which were unrelated to the current offense. As in *Dumes*, we conclude it was error to admit the laundry list of prior suspensions and convictions that were unrelated to the instant charge. Notwithstanding the error, we need not reverse Kellems's conviction because we conclude that the error was harmless.

As the *Dumes* court indicated, where the only issue before the jury is a question of law, the introduction of the defendant's prior suspensions and offenses may constitute harmless error. Unlike the circumstances presented in *Dumes* where a factual dispute

⁵ The suspension reasons included: "MOTOR VEHICLE – FELONY", "OPERATING WHILE INTOXICATED" (listed twice), "PRIOR OWI WITHIN 5 YEARS" (listed twice), "OWI UNSPECIFIED", "UNSATISFIED LIABILITY FOR ACCIDENT" (listed twice), "CHEMICAL TEST FAILURE" (listed twice), "CHEMICAL TEST REFUSAL", "NO INSURANCE – ACCIDENT", "NO INSURANCE – TICKET" (listed three times), "FAIL TO FILE PROOF OF FIN RESP – SR22" (listed three times), "FAIL TO APPEAR FOR SPEEDING", "FAILURE TO COMPLY FOR DDC", "REPEAT INSURANCE VIOLATION", and "FAILURE TO MEET REQUIREMENTS". *State's Exhibit 1*.

⁶ The "convictions" were for offenses listed as: "RESIST ARRES W/ VEH FELONY", "NO INSURANCE – TICKET" (listed twice), "OPERATING-HTV/MSDMNR" (listed twice), "SPEEDING" (listed twice), "NO VALID LICENSE" (listed twice), "OPERATING WHILE INTOX", "OWI UNSPECIFIED", and "PRIOR OWI WITHIN 5 YEARS". *State's Exhibit 1*.

raised by Dumes's testimony was to be resolved by a determination his credibility, here, there was no factual dispute and Kellems's credibility was not at issue. Kellems did not dispute that he was driving the truck on the day in question and did not dispute that the "HENRY L KELLEMS JR" identified in the driving record had his driving privileges validly suspended for being an HTV. The only issue for the jury to determine was whether the State proved beyond a reasonable doubt that Kellems was the same Kellems identified in the driving record. We rejected Kellems's argument in this regard above, concluding that there was sufficient evidence from which the jury could have reasonably concluded that Kellems was one and the same as the "HENRY L KELLEMS JR" identified in the driving record. *State's Exhibit 1*. There being no credibility determination to be made, we conclude there was "no danger that the jury [would] convict the defendant on his character rather than for the acts he committed in connection with the charge[] for which he [was] being tried." *Dumes v. State*, 718 N.E.2d at 1176 n.5. Under the facts of this case, the error in the admission of Dumes's driving record, in an unredacted form, was harmless.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.